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No. 89-1941

In The

Supreme Court of the United States

October Term, 1989

NANCY JANE BAKER,

Petitioner,

vs.

LLOYD W. AUBRY, JR., CALIFORNIA STATE LABOR COMMISSIONER, and FIDELITY BROKERAGE SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal For The First Appellate District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GARY D. ROBERTS
MUNGER, TOLLES & OLSON
355 South Grand Avenue
Los Angeles, California 90071-1560
Telephone: (213) 683-9100

Counsel for Respondent Fidelity Brokerage Services, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

As applied to an arbitration agreement contained in a contract involving commerce, does the Federal Arbitration Act preempt the portion of California Labor Code Section 229 that invalidates agreements requiring arbitration of claims for "due and unpaid wages"?[1]

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[1] Fidelity's principal objection to Baker's statement of the question presented is that it suggests that Congress has given states some special powers in this area. This erroneous suggestion, made without supporting authority, has never been raised below and is not a proper issue in Baker's Petition.

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Respondent Fidelity Brokerage Services, Inc., respectfully prays that a writ of certiorari not issue to review the decision of the Court below.

I.

STATEMENT OF THE CASE

The relevant facts, as found by the Court below and unchallenged here, can be stated briefly. Fidelity Brokerage Services, Inc. ("Fidelity") employed Nancy Jane Baker ("Baker") as a Registered Representative from March 1986 to March 1987. In connection with her employment as a Registered Representative, Baker executed a Uniform Application for Securities Industry Registration, which is commonly known as a U-4 and which is utilized throughout the securities industry. The U-4 contains the following arbitration agreement:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations with which I register, as indicated in item 10 as may be amended from time to time.

In item 10, Baker indicated that she was registering with the New York Stock Exchange ("NYSE"). NYSE Rule 347 requires arbitration as follows:

> Any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative by and with such member or member organization shall be settled by arbitration, at the

> instance of any such party, in accordance with the arbitration procedure prescribed elsewhere in these rules.

After leaving Fidelity, Baker filed a Complaint with the California Labor Commissioner in August 1987 alleging that she was improperly denied overtime pay in violation of state law. Fidelity answered this Complaint, denying the claim on the merits but simultaneously asserting its right to arbitrate the claim. A hearing before a Deputy Commissioner was held on January 27, 1988. After briefing of the issue by all the parties, the Labor Commissioner dismissed Baker's wage claim for want of statutory jurisdiction in light of her arbitration agreement. Baker sought review of this decision in the California courts by writ of mandate.

Both the California Court of Appeal and the Superior Court held that Baker's U-4 and Rule 347 operated together to create a valid arbitration agreement under California law. The Courts below also held that this arbitration agreement involved commerce and was therefore subject to the Federal Arbitration Act. The Courts, applying that Act, found that this arbitration agreement was sufficiently broad to encompass Baker's claim for overtime under state law.

II.

REASONS THE PETITION SHOULD NOT BE GRANTED

A. This Court Has Recently Addressed The Same Issue Presented In This Case.

In light of the factual findings below, which are unchallenged here, the only issue presented is whether the provision of California Labor Code Section 229 invalidating certain arbitration agreements is preempted by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

This Court has recently addressed precisely this issue in *Perry v. Thomas*, 482 U.S. 483, 107 S.Ct. 2520, 96 L.Ed.2d 426 (1987). In *Perry*, the plaintiff brought a claim for wages due. The plaintiff in *Perry* had executed the standard U-4 arbitration agreement presented in this case. In an attempt to avoid arbitration, he had also relied on California Labor Code Section 229, the same statute at issue here. Section 229 exempts from arbitration claims brought under the "provisions of this article [of the Labor Code] for the collection of due and unpaid wages. . . ." Thus, *Perry* presented exactly the same issue presented by this case: how should a court reconcile a direct conflict between an arbitration agreement found to affect commerce (and thus subject to the Federal Arbitration Act) and Labor Code Section 229, a state statute, that purports to exempt certain classes of claims from arbitration?

This Court in *Perry* analyzed the issue, applying standard preemption doctrine. Under the Federal Arbitration Act, arbitration clauses are specifically enforceable as a matter of federal law. California Labor Code Section 229, a state statute, plainly states that various claims relating

to wages are not arbitrable. In light of the Supremacy Clause, this Court held that the Federal Arbitration Act (rather than any inconsistent state law) must be given effect:

> "[t]he preeminent concern of Congress in passing the [Federal Arbitration] Act was to enforce private agreements into which parties had entered. We have accordingly held that these agreements must be 'rigorously enforce[d].' " This clear federal policy places § 2 of the Act in unmistakable conflict with California's § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.

Id. at 2526 (citations omitted).

It is plain from the *Perry* opinion that the federal policy favoring arbitration requires the preemption of all conflicting state laws:

> "[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and *withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.* Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."

Id. at 2525 (citation omitted; emphasis added; *quoting Southland Corp. v. Keating*, 465 U.S. 1, 10, 16, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984).

The California courts correctly applied *Perry* in this case, holding that Baker must arbitrate her claim under Labor Code Section 229, notwithstanding any California policy to the contrary.

Baker attempts to avert the clear holding of the *Perry* case by arguing that only contractual claims – not statutory claims – are covered by that decision. The short answer to this argument is that *Perry* itself involved a claim under the same statute relied upon by Baker here: Labor Code Section 229.[2] In *Perry*, the plaintiff attempted to invoke Section 229 to obtain a judicial resolution of claims for certain commission payments. Here, Baker seeks to invoke Section 229 to obtain a judicial resolution of her overtime pay claim. There is simply no basis to distinguish this case from *Perry*.

In short, this case *is Perry*. Baker has made no attempt to argue that *Perry* should be overruled. Its holding is completely in step with this Court's other recent pronouncements on arbitration. *See* footnote 2, *supra*. Thus, there is no reason whatever that this Court should again examine California Labor Code Section 229 only three years after *Perry*.

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[2] It should be noted that the argument that statutory claims are not arbitrable has been rejected repeatedly in the recent past, both before and after *Perry*. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, ___ U.S. ___, 109 S.Ct. 1917, 1921, 104 L.Ed.2d 526 (1989) (holding that statutory securities claims are arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987) (holding that statutory claims for securities fraud and RICO claims are arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (holding that antitrust claims are arbitrable); *Southland Corp. v. Keating*, *supra*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (holding that claims under the California Franchise Investment Act are arbitrable, notwithstanding a contrary state statute).

B. Baker Has Not Demonstrated Any Confusion In The Law Or Pressing Need To Address This Issue.

1. There is no confusion in the law.

Baker's Petition alludes to the need to clarify the law. This contention has no substance, for she has failed to identify any confusion in this area.

Baker relies primarily on *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), in support of this argument. *Barrentine* addressed the question of whether a member of a collective bargaining unit must arbitrate his federal wage claims and is readily distinguishable.

First, *Barrentine* involved a narrow arbitration agreement typical of a collective bargaining agreement rather than the broad private arbitration agreement involved in this case. Under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, only claims that require interpretation of the collective bargaining agreement are subject to arbitration in the collective bargaining context. *Id.* at 737; *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985) (arbitration proper in collective bargaining context only as to claims "inextricably intertwined" with the collective bargaining agreement). *Barrentine* says nothing about arbitration under the Federal Arbitration Act, which empowers arbitrators to hear virtually any claim. *See Perry, supra*, 107 S.Ct. at 2525-2527. *See also* footnote 2, *supra*.

Sound policy underlies the distinction between collective bargaining arbitration and private arbitration under the Federal Arbitration Act, as shown by a comparison of this case with *Barrentine*. In *Barrentine*, in ruling

that claims under the Fair Labor Standards Act are not subject to collective bargaining arbitration, this Court noted that, first, the union controls the right to bring a grievance to arbitration in the collective bargaining context; thus, if limited to the arbitral remedy, the individual might lose his claim by the union's failure to pursue it. *Id.* at 1446. Second, this Court emphasized that a collective-bargaining arbitrator's sole duty is to interpret the *contract;* a collective bargaining arbitrator's decision based on his view of *statutory* law – rather than the contract – is unenforceable. *Id.* at 1446-47. Finally, the Court noted that collective bargaining arbitrators lack the power to grant a full range of remedies. *Id.* Based on these considerations, *Barrentine* held the federal wage claims in question were not arbitrable.

None of the factors conclusively relied upon in *Barrentine* is present in arbitration under the Federal Arbitration Act. First, the individual – not a third party such as a union – fully controls his claim. Second, the arbitrator under the Federal Arbitration Act is not required to ignore statutory law but, in fact, is bound to apply it. *See* cases cited in footnote 2, *supra.* Finally, the arbitrator under the Federal Arbitration Act has plenary power to award all appropriate relief. *E.g., McMahon, supra* (arbitrator may award treble damages and attorney's fees under RICO). Thus, the distinction between the rule applicable in individual arbitration under *Perry* versus the rule applicable in collective bargaining arbitration under *Barrentine* is founded on sound public policy.

Barrentine is distinguishable in one other regard, vital under federal supremacy principles: it involved two

federal statutes (Section 301 and the Fair Labor Standards Act), which this Court was attempting to harmonize. This case involves a direct clash between a *state* statute and a *federal* statute. Under the Supremacy Clause, the federal statute (the Federal Arbitration Act) controls.[3]

2. No pressing legal issue is presented on these facts.

Baker's attempt to justify a writ of certiorari based on the importance of the issue presented also fails. Baker's argument that a whole panoply of state labor protections will be lost is without substance.

First, the unspoken premise of Baker's argument is that an arbitrator will be unfair in applying California's labor law. That argument is wholly insubstantial: Baker has made no effort at any time during this proceeding to challenge the fairness of the arbitral tribunal. There is no evidence that any substantive right will be lost or threatened if she is forced to abide by her arbitration agreement; the dispute will simply be adjudicated in an

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[3] The other cases on which Baker seeks to rely are distinguishable on the same bases as *Barrentine. McDonald v. City of West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984) (employee need not arbitrate federal discrimination claim under his collective bargaining agreement); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974) (same); *Evans v. Southern Pacific Transportation Co.*, 213 Cal.App.3d 1378, 262 Cal.Rptr. 416 (1989), *cert. denied*, 58 U.S.L.W. 3800 (1990) (same under analogous provisions of Railway Labor Act).

arbitral forum. In light of the strong federal policy favoring arbitration that has evolved over the last few decades, it is simply too late in the day to argue that merely compelling a party to comply with an arbitration agreement violates any fundamental tenet of public policy.

Second, Baker's argument that important questions are left unanswered by the current state of the law misses the mark. It may be that, after extensive experience with *Perry*, the lower courts will need additional guidance in refining or even limiting the scope of federal preemption in some areas. It may even be that, under some future circumstances, arbitration might be shown to result in the loss or infringement of important contractual or statutory rights. But this case does not present any such circumstances. There is no confusion, after *Perry*, on the issue presented here.

In short, this Court should not revisit the *Perry* case only three years after it was decided. Prior to attempting to define the precise contours of the *Perry* rule, this Court should await future cases that actually probe the limits of the wisdom and soundness of *Perry's* teaching. Only then, with the aid of lower court experience in the interim, will this Court be in an ideal position to cast further light on this issue.[4]

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[4] Baker's reliance on *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195 (4th Cir. 1990) and *Nicholson v. CCP Int'l Inc.*, 877 F.2d 221 (3d Cir. 1989), is simply baffling. Both of those cases address the issue of whether *federal* age claims must be arbitrated. This case, regardless of how determined, would not serve to answer that question or clarify it in any way.

III.

CONCLUSION

Based on the foregoing, Respondent Fidelity Brokerage Services, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

GARY D. ROBERTS
MUNGER, TOLLES & OLSON
355 South Grand Avenue, 35th Floor
Los Angeles, California 90071
Telephone: (213) 683-9100

Attorneys for Respondent
Fidelity Brokerage
Services, Inc.

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